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No. 86-142

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

THE CITY OF MONTGOMERY, ET AL.,
Petitioners,

v.

LONNIE BENJAMIN and HAROLD HICKEN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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The petitioners seek to have this court grant certiorari in this case in order to have the court abandon its long standing rule that governmental employees may not be penalized for exercising rights guaranteed them by the

Fifth Amendment to the constitution of the United States. See, e.g. *Lefkowitz v. Cunningham,* 431 U.S. 801, 805 (1977). The petition should be denied because this case presents no grounds upon which certiorari should be granted.

I. THIS COURT'S PREVIOUS DECISIONS STRIKE THE PROPER BALANCE BETWEEN THE RIGHTS OF GOVERNMENTAL EMPLOYERS AND THE RIGHTS OF THEIR EMPLOYEES

In a consistent series of decisions beginning with *Garrity v. New Jersey,* 385 U.S.493 (1967), this court has held that public employees may not be required to give up their Fifth Amendment right against self-incrimination as a condition of their continued employment. See also, *Lefkowitz v. Cunningham,* 431 U.S.801 (1977); *Uniformed Sanitation Men's Association v. Commissioner of Sanitation,* 392 U.S. 273 (1968); *Gardner v. Broderick,* 392 U.S.271 (1968). Recently, this court noted that "These cases make it clear that a state may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself (citations omitted)" *Minnesota v. Murphy,* 465 U.S.420, 434 (1984).

In articulating these rules, this court has been incredibly sensitive to the needs of both public employers and their employees. Thus, this court's decisions strike the proper balance between an employer's right to have an employee perform his function and the employee's right not to incriminate himself. Under those decisions, an employee may invoke his right against self incrimination in any proceeding. If he is threatened with dismissal for failing to testify, ". . . the privilege against self-incrimina-

tion thus affords a form of use immunity which, absent waiver, automatically attaches to compelled incriminating statements as a matter of law." *Hester v. City of Milledgeville,* 777 F.2d 1492, 1496 (11th Cir. 1985). Thus, the employee, once threatened with dismissal, is free to provide whatever information may be within his knowledge without fear of self incrimination. The decision below is a perfect example of the proper application of the principles of *Garrity* and its progeny. It is eminently correct and need not be reviewed.

The petitioners' main criticism of the decision below is that it ignores the right of a government employer to have an employee testify "voluntarily" as though the word "voluntarily" is a talisman which should be outcome determinative. (Pet. 9n.8:14-17). The petitioners' argument has no basis in the law and misconstrues the facts of this case.[1]

The thrust of petitioners' argument is that a public employer is denied the full benefit of a public employee when that public employee agrees to testify only because he is threatened with dismissal. The employer is denied the full benefit of the employee, according to petitioners, because such testimony then becomes "involuntary and coerced" (Pet. 14). However, such testimony becomes "involuntary and coerced" only in the sense that the em-

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1. Petitioners also argue that a balancing test should be applied in Fifth Amendment cases involving a governmental employee. (Pet. 17-22). The cases on which the petitioners rely are inapposite to this case because they involve First rather than Fifth Amendment rights. The court has always utilized a balancing test where employees' First Amendment rights were at stake. It has never suggested that Fifth Amendment rights of employees can be balanced away.

ployee would not have offered to testify if he knew that what he said could be used against him. It can thus be "involuntary and coerced" only in the same sense that the testimony of any immunized witness is "involuntary and coerced". No immunized witness testifies "voluntarily". An immunized witness testifies because he has been promised that nothing he says will be used against him. Respondents' position in this case is like that of any immunized witness. They plainly did not want to testify but were obviously willing to do so after they were guaranteed immunity by operation of law. The petitioners' argument, taken to its logical conclusion, would require this court to find that all immunized testimony is "involuntary and coerced". Obviously, such a holding would seriously undermine the effectiveness of many criminal prosecutions.

II. THE DECISION BELOW TURNS ON THE UNUSUAL FACTS OF THIS CASE

The decision below is totally fact bound. The court below recognized that quality when it reversed the lower court "under the unusual facts of this case . . . " (Pet.App. 2a). An analysis of the factual statement in the opinion of the court of appeals underscores the correctness of that analysis. Because this case turns on its facts, it is a particularly inappropriate candidate for a grant of certiorari. As this court has often noted, "We do not grant certiorari to review evidence and discuss specific facts". *United States v. Johnston,* 268 U.S.220, 227 (1925).

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III. CONCLUSION

The decision below has none of the majesty nor malevolence which the petitioners seek to give it. It is a decision based on settled law which revolves around the unusual factual nature of the case. It is also a decision in an area of law which needs no revision by this court. The petition for writ of certiorari should be denied.

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